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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-728

RONALD A. DIPAOLOA,

Petitioner,

v.

JAMES P. MITCHELL (FORMERLY WALTER M. RIDDLE) WARDEN, VIRGINIA STATE PENITENTIARY;
WILLIAM H. POWELL, SHERIFF, SUSSEX COUNTY,
VIRGINIA; and JAMES D. SWINSON, SHERIFF,
FAIRFAX COUNTY, VIRGINIA,

Respondents.

Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO
GRANTING OF WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The respondents, James P. Mitchell (formerly Walter M. Riddle) Warden, Virginia State Penitentiary; William H. Powell, Sheriff of Sussex County, Virginia; and James D. Swinson, Sheriff of Fairfax County, Virginia, respectfully pray that a Writ of Certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on August 21, 1978, not be granted.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 581 F.2d 1111 and is set forth in the Appendix to the Petition for a Writ of Certiorari. (Cert. App. E). The Order and the Memorandum Opinion and Order of the District Court are unreported but are contained in the Appendix to the Petition. (Cert. App. C and D).

JURISDICTION

The petitioner asserts that the jurisdiction of this Court to issue a Writ of Certiorari is grounded upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is the decision of the Court of Appeals correct in holding that petitioner's belated "no knock" claim should not be considered at this time on federal habeas corpus?

STATUTES AND RULES INVOLVED

The relevant constitutional and statutory provisions and rules of court are set forth in full in the Appendix to the Petition. (Cert. App. H-K).

STATEMENT OF THE CASE

Petitioner was tried by a jury on June 4 and 5, 1974, in the Circuit Court of Fairfax County, Virginia, wherein he was convicted of possession of marijuana with intent to distribute and sentenced to serve a term of five (5) years in the Virginia State Penitentiary and to pay a \$1,500.00 fine. Prior to trial on the merits, petitioner filed a motion to suppress the marijuana and other evidence on the ground of unlawful "search and seizure." This motion was denied

after the State trial court considered the authorities cited and evidence of both sides. Petitioner subsequently appealed his conviction to the Virginia Supreme Court and asserted, among other assignments of error, that the motion to suppress had been erroneously denied. Petitioner contended in his petition for writ of error that "the arresting police officers had absolutely no prior knowledge of the defendant or any illegal activity occurring within the house but merely the reliable observation that marijuana was present within the house; and they had absolutely no factual basis to believe that the defendant, Ronald DiPaola, had committed any crime." (App. 27).¹ Petitioner went on to assert that "[n]o factual pattern can be demonstrated by the Commonwealth in this case to provide the arresting police officers . . . with the reasonable belief that Ronald DiPaola [petitioner] had committed a crime as they raced towards that house." (App. 27). Petitioner then stated that "[t]he Commonwealth asserts that the search is lawful because it is incident to a lawful arrest . . . and that the marijuana was within plain view of the arresting officers, Bazyk and Whalen . . ." [but] "the plain view doctrine is not applicable to this case." (App. 27).

After considering the Commonwealth's brief in opposition (App. 37), the Virginia Supreme Court rejected the petition for writ of error and supersedeas and affirmed the judgment below by order of August 27, 1975. (App. 30).

Petitioner subsequently filed a petition for writ of habeas corpus in the Circuit Court of Fairfax County, Virginia,

¹ This citation refers to the Joint Appendix filed in the Court of Appeals. References to the Supplemental Joint Appendix filed in the Court of Appeals will be cited as (Supp. App.), and references to the Appendix of the Petition for Writ of Certiorari will be designated as (Cert. App.).

in which he belatedly asserted that the "search and seizure" was unlawful because it was warrantless and because the officers who *subsequently* entered the house *failed to knock and failed to announce their purpose*. By letter dated November 25, 1975, the State court denied and dismissed the petition on the ground that petitioner lacked standing in habeas corpus proceedings to raise his new "no-knock" issue for the first time when he had a full opportunity to raise that particular question at his trial and upon appeal and on the ground that the issue of absence of a warrant was correctly decided at the time of trial. (App. 224-225). The record reflects no assertion to the state court to the effect that petitioner had no "full opportunity" to object in timely fashion. (See State Habeas Transcript).

Petitioner then filed a petition for writ of habeas corpus in the United States District Court, Alexandria Division. (App. 1). After considering all state court records, the pleading and the memoranda of law filed by the parties, the District Court granted the writ of habeas corpus (App. 69). In the District Court the respondents had asserted, among other points of defense, that "the inquiry of the federal court should be confined solely to whether the petitioner had a fair opportunity in the state courts to raise and have adjudicated [his] claim." (App. 11).

Upon the respondents' appeal, the Fourth Circuit Court of Appeals vacated the judgment of the District Court and remanded the case for reconsideration in light of *Stone v. Powell*, 428 U.S. 465 (1976). The District Court reviewed the record and, on January 5, 1977, opined that the record "shows that the State of Virginia, in accordance with *Stone*, did provide petitioner with an opportunity to fully and fairly litigate his Fourth Amendment claims, even though the arguments in support of those claims before the state

court were different from those presented here." (Supp. App. at 2).

Thereafter in the District Court petitioner filed a "Motion to Supplement Record and Reconsider Court's Order of January 5, 1977." Acting upon this motion, after hearing oral argument from counsel, the District Court adhered to its earlier decision by issuing a Memorandum Opinion and Order on January 17, 1977, denying relief. In this Memorandum Opinion the Court stated that "[p]etitioner concedes that Fourth Amendment claims were raised by him in state court proceedings; however he says that his 'no knock entry' claim was not raised or considered because neither he nor his counsel was aware of the manner or entry until after his trial was concluded." (Supp. App. at 4). The Court received the affidavit of the defense attorney which stated that counsel was not aware of the nature of entry until after trial when the information was brought to his attention by another client (co-defendant Scheps) who was in the house and involved in the events; that the manner of entry was raised in petitioner's direct appeal to the Supreme Court of Virginia; and that "Brady" material was requested by counsel prior to trial. (Supp App. at 4-5).

The District Court noted that the state preliminary hearing transcript contained references to a "raid" by police on the house and that police "hit" the residence. Although these references were not considered to be significant standing alone, the Court observed that perhaps they might be when considered with other evidence which may have alerted counsel as to the type of entry. Then, based upon the aforesaid affidavit and the entire record, the Court rendered the following findings:

- (1) It is inconceivable that petitioner, even though downstairs from the floor where the entry occurred,

was not aware of the manner of entry if, as he asserted and as the Court found, the entry was so egregious (breaking in of one door and breaking of glass). The record shows that the house was quiet until the entry.

(2) Even though his other client in the case, Scheps, made counsel aware of the circumstances surrounding the entry shortly after the trial and before sentencing, no motion for a new trial was made either on the ground of after-discovered evidence or on the ground of suppression of evidence favorable to the accused upon request. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Stover v. Commonwealth*, 211 Va. 789, 180 S.E.2d 504, 508-509 (1971). A request was made here. The implications of such circumstances were not new even then. *Ker v. California*, 374 U.S. 23, 37 (1963). Faced with the issue upon a proper record, as it subsequently was in *Johnson v. Commonwealth*, 213 Va. 102, 189 S.E.2d 678 (1972), the Virginia Supreme Court might well have concluded that there were no "exigencies of the circumstances" warranting the manner of entry present here. *Id.* at 680. (Supp. App. at 5-6).

The District Court denied the motion to reconsider, and Petitioner appealed. The Court of Appeals affirmed the judgment below, citing its earlier opinion in *Doleman v. Muncy*, 579 F.2d 1258 (4th Cir. 1978), and held that the state had provided the mechanism and an opportunity for full and fair litigation of the "no knock and announce" issue. (Cert. App. at 14a-16a). 581 F.2d at 1113-1114. The Court of Appeals recognized that its task was to determine whether Virginia law provided petitioner an opportunity for litigation of his claim, notwithstanding the lawyer's alleged ignorance of its factual basis until after return of the verdict by the jury, and the Court found that such an opportunity existed under Virginia procedure. (Cert. App. 14a-16a). 581 F.2d at 1113-1114.

STATEMENT OF FACTS

On December 28, 1973, Investigator William P. Colavita, a Fairfax County Police Officer, who was working in an undercover capacity in the narcotics squad, received a telephone call at about 7:30 p.m. from a police informant who related that there were drugs present in a certain house located at 3240 Kenny Drive in Annandale in Fairfax County, Virginia. (App. 80-81, 116). Arrangements were made to purchase twenty pounds of marijuana from persons at the house, and undercover Officer Colavita then advised other members of the narcotics squad that he was to meet an individual at the residence on Kenny Drive to purchase the marijuana, and he indicated that they should proceed there to cover the transaction. (App. 80, 102, 112-113, 117, 151, 170). It was understood that the other police officers would confiscate any illegal drugs or marijuana in the house, make the arrest, and back Colavita in the event that anything went wrong. (App. 152-153, 159). Colavita was "wired for sound" with a transmitting device, but a back-up signal (of Colavita going to the trunk of his vehicle and raising the trunk lid) was devised for use in the event that the transmitter failed to function. (App. 82, 103, 119, 151-152, 172).

Upon arriving at the house on Kenny Drive at about 8:30 p.m., Colavita met the petitioner outside in the front yard and indicated to the petitioner that he wanted to purchase twenty pounds of marijuana. (App. 73, 83, 120). Petitioner then invited Colavita into the house and led him to the basement, where petitioner pointed to a box on the floor and stated that Colavita's twenty-pound purchase was in the box located there. (App. 73, 84-85). The box was open and marijuana was visible in the box. (App. 74, 85, 131). Colavita observed that the plastic bags contained a

lot of stalks in them, and he made a remark to this effect. At this point another individual in the basement cut open one of the bags and showed Colavita exactly what he was purchasing. (App. 134). After realizing that the transmitting device was apparently not functioning, Colavita stated that he had to go out to his vehicle to get some additional money from the trunk, thinking that would permit him to give the back-up signal for the other officers to enter the house. (App. 135). He proceeded to his vehicle, opened the trunk, and then returned to the basement. When the other officers still failed to appear, Colavita realized that they had missed the back-up signal, and so he once again left the basement ostensibly to obtain more money from his vehicle. (App. 86-87, 135-138, 144-145). He saw a couple of the police vehicles and this time waved for the officers to come inside. (App. 88, 137, 145). He returned to the basement and within two minutes the other officers entered the house. (App. 88-89, 138). Police Corporal Whelan forced open the front door, and Investigator John Bazyk followed him in the house. (App. 105, 214). Investigator James Sizemore forcibly entered a rear door of the house. (App. 170, 172). Whelan proceeded directly to the basement and identified himself as a police officer. (App. 105, 163). He ordered everyone present, including the petitioner and undercover officer Colavita, to stand against the wall and to remain still. He advised them that they were under arrest for possession of marijuana with intent to distribute. (App. 108, 163). Shortly thereafter, Officer Bazyk arrived in the basement. (App. 163). The officers pretended to arrest Colavita in order to maintain his "cover" and to protect the informant's identity. (App. 90-91, 114, 138-139, 179).

According to the testimony of one Peter Scheps, an individual who was in the dining room of the house at the time

of the police entry, officers "broke in through the front door." (App. 214). Scheps also testified that he heard breaking glass in the back door at the kitchen. (App. 214). Scheps stated that none of the officers who initially entered were in uniform, and they did not immediately identify themselves as police officers. (App. 216, 223). Rather, the officers initially were "joking around," according to Scheps, and they jokingly commented that "[t]his isn't a bust. . . This is just a big rip-off." (App. 218). While this testimony was not rebutted, Scheps stated on cross-examination by the Assistant Commonwealth's Attorney that he was not in the basement at any time that the relevant events transpired. (App. 219).

ARGUMENT

The Court Of Appeals Correctly Decided That Petitioner's Belated "No Knock And Announce" Claim Should Not Be Considered At This Time On Federal Habeas Corpus.

Petitioner suggests in his Petition for Writ of Certiorari that his "no knock and announce" claim rests on a "bad faith," "intentional," and "malicious" violation of the Fourth Amendment by police to secure the evidence against him. He further suggests that an exception should be carved into the holding of *Stone v. Powell*, 428 U.S. 465 (1976), to create a special category of Fourth Amendment claims, called "egregious" unlawful searches and seizures, which must be considered under *Stone* notwithstanding a full and fair opportunity for litigation of the issue in state court. (Petition at 7-11). Presumably, determination of what qualifies as an "egregious" search and seizure would have to be made by litigation on a case-by-case basis upon standards not suggested by petitioner, and this would engender a quagmire of new federal litigation. While respondents sub-

mit that there should be no special categories created and no invitation to additional nebulous litigation attempting to pigeon hole Fourth Amendment issues, certainly this case is not the proper vehicle for consideration of those questions.

As the Court of Appeals below noted, the facts in petitioner's case were that a regular, full time policeman, one William Colavita, who was working undercover and acting upon an informant's tip, went into a house in Fairfax County, Virginia posing as a prospective purchaser of marijuana. The officer was invited into the house and led to the basement by petitioner. There they negotiated for the purchase of twenty pounds of marijuana, and the box containing the marijuana was given to Officer Colavita for inspection. (Cert. App. 12a). After the negotiations were completed, on a signal from Officer Colavita several other policemen in civilian clothing and with guns drawn entered the house by forcing open the front door and breaking a window pane in the kitchen door in order to unlock it. One of the officers jokingly commented to people on the first floor (petitioner was in the basement), "This isn't a bust. This is just a big rip-off." One of the officers immediately went down into the basement and was followed by another policeman. They identified themselves as police officers and arrested the persons present. So that the "cover" of Mr. Colavita (the undercover officer who was invited into the house by petitioner) could be protected, they pretended to arrest him as well. (Cert. App. 11a-12a). 581 F.2d at 1112.

Neither the District Court nor the Court of Appeals found the marijuana seizure to be an intentional Fourth Amendment violation or the fruit of "bad faith" or "malicious" police conduct, but the Court of Appeals did observe that "[s]ince Colavita had been invited into the house, and had obtained possession of the marijuana as its purchaser . . .

[the cases of *United States v. Bradley*, 455 F.2d 1181 (1st Cir. 1972) and *United States v. Glassel*, 488 F.2d 143 (9th Cir. 1973)] suggest that suppression is not required under [18 U.S.C.] § 3109 by reason of a subsequent unlawful entry by other policemen." (Cert. App. 13a). 581 F.2d at 1113. The Court of Appeals also noted that any subsequent unlawful entry by other policemen would not affect the legality of Officer Colavita's presence. (Cert. App. 16a). Furthermore, although the District Court thought the subsequent entry by the other officers was "egregious," it did not find "bad faith," an intentional violation, or "malice" on their part, and there was no evidence of same. Also, as the Court of Appeals below observed, the "statute, 18 U.S.C.A. § 3109, requiring federal law enforcement officers to knock and to identify themselves, had no application" to the state officers, "but the district court thought that the breaking of the doors and the absence of any immediate announcement was so egregious that it *amounted to* a violation of the Fourth Amendment"—not that it was an egregious Fourth Amendment violation. (Emphasis added). (Cert. App. 13a). 581 F.2d at 1113.

Turning to the matter of whether petitioner had an opportunity for full and fair litigation of his claim in state court, this case obviously involves Virginia's particular rules and procedures concerning after-discovered evidence, contemporaneous objection, and relief for failure to make contemporaneous objection. Petitioner refers to a "rigid contemporaneous objection requirement" in Virginia, but in fact Rule 3A:12 of the Rules of the Supreme Court of Virginia provides that although failure to make contemporaneous objection normally constitutes a waiver of the objection, "[f]or good cause shown the court may grant relief from any waiver provided for in this rule." (Rule 3A:

12(e), set forth in the Appendix to the Petition at 27a). Moreover, as the Court of Appeals below pointed out:

Under Virginia rule 3A:22 provision is made for motions for new trials and to set aside a verdict of guilty if made within twenty-one days after the entry of the final order. Under the rule the motion could have been made within twenty-one days after the imposition of sentence in October or November. Had such a motion been made, we can find nothing in Virginia law which would suggest that an evidentiary hearing and a ruling on the constitutional claim would not have been appropriate and required. (Cert. App. at 14a).

Petitioner argues that the Court of Appeals was mistaken in its conclusion that his Fourth Amendment claim could have been raised by post-trial motion under Virginia procedure, and he cites *Lewis v. Commonwealth*, 209 Va. 602, 116 S.E.2d 248 (1969); *Leigh v. Commonwealth*, 192 Va. 583, 66 S.E.2d 586 (1951); and *United States v. Williams*, 415 F.2d 232 (4th Cir. 1969), for the proposition that a motion under Rule 3A:22(b) "is not an appropriate vehicle for presenting a claim that does not go to . . . the question of guilt or innocence, but to a collateral issue." Not only do these cases not stand for that proposition but obviously the admission of the marijuana and laboratory analysis was central to petitioner's prosecution—not "merely collateral." Petitioner states in his brief that he "suffered actual prejudice, 'because, undoubtedly, the evidence seized played an important part in the conviction obtained by the state.'" (Petition at 14). Petitioner has not cited a single Virginia case holding or suggesting that a motion to set aside a verdict under Rule 3A:22 cannot be based upon improper admission of evidence of guilt when the basis for objection was excusably unknown to the defense at trial, or if, as suggested by petitioner (Petition at 4), the prosecution im-

properly withheld evidence forming the basis for the objection. Furthermore, petitioner's claim clearly does not constitute a traditional newly-discovered evidence issue mandating application of the criteria cited by petitioner. See *Compton v. Commonwealth*, 163 Va. 999, 1002-04, 175 S.E. 879, 880-81 (1934);² *Hardy v. Commonwealth*, 110 Va. 910, 927-30, 67 S.E. 522, 529-30 (1910).³ Under Virginia procedure consideration of a motion belatedly objecting to admission of evidence upon "unlawful search and seizure" grounds requires a determination of whether there is "good cause shown" for the defendant having failed to tender his objection in timely fashion. If good cause is shown under Rule 3A:12(c) and the objection is valid, then under Rule 3A:22(b) the trial court may set aside the verdict "for error committed during the trial" by its admission of the evidence which had been unlawfully obtained.

Petitioner continues to argue that *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), precludes state habeas corpus review of his "no knock" issue, and while the state

² In *Compton*, a motion to set aside the verdict was held to have been improperly denied by the trial judge despite the assertion by the Attorney General that the defendants had not alleged or proven that they did not know until after the verdict that the Sheriff and Clerk of Court had employed the private prosecutor, which employment was the basis for the motion.

³ In *Hardy*, the Court implied that if the defendant had a valid objection and was justifiably unaware of same until after the verdict, relief would be granted. The basis for the motion to set aside the verdict in *Hardy* was that the jurors had attended a motion picture allegedly depicting the story of a crime similar to the one charged against the defendant. In addition to finding the basis for the motion to be without merit, the Court opined that it was "conclusively shown . . . that counsel for the accused knew [of the incident] before the case had been submitted to [the jury]." *Hardy v. Commonwealth*, *supra* at 930. In neither *Compton* nor *Hardy* was the basis for objection rejected as "collateral," and in *Compton* the convictions were reversed.

circuit court did refuse such review under authority of *Parrigan* (Cert. App. G), the record of the state habeas proceedings reflects no assertion of "good cause" for failing to object at trial or any assertion that there was no full and fair opportunity at the criminal trial to litigate the issue. (See State Habeas Transcript). In *Parrigan*, the Virginia Supreme Court cited the concurring Opinion of Mr. Justice Powell in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), among other authorities, and held that:

It is true we said in *Griffin v. Cunningham*, 205 Va. 349, 355, 136 S.E.2d 840, 845 (1964): "It is well settled that the deprivation of a constitutional right of a prisoner may be raised by *habeas corpus*." But in the interest of the finality of judgments and since the original function of the writ of habeas corpus was to provide an inquiry into jurisdictional defects, we hold that the principle enunciated in *Griffin* is inapplicable *when a prisoner has been afforded a fair and full opportunity to raise and have adjudicated the question of the admissibility of evidence in his trial and upon appeal*. (Emphasis added). (Citations omitted). (215 Va. at 29).

Essentially the same reasoning of "full and fair opportunity" enunciated by the Virginia Supreme Court in *Slayton v. Parrigan*, *supra*, was later set forth by this Court in *Stone v. Powell*, *supra*.

It is clear that at no time has petitioner presented his "no knock" claim to the Virginia Supreme Court, either pursuant to its original habeas corpus jurisdiction or otherwise, in the context of his assertion in Federal court that the particular facts and circumstances of his case denied him a "full and fair opportunity" (whether by ineffective assistance of counsel or otherwise) to litigate his claim at his criminal trial. The Supreme Court of Virginia has never had occasion to rule upon the merits of petitioner's "cause"

for not objecting at trial, upon petitioner's standing to obtain State habeas review on the merits of his Fourth Amendment issue in view of the particular facts and circumstances of his case, or on a claim of ineffective assistance of counsel for not raising his issue at trial.

The Court of Appeals below opined that:

Slayton v. Parrigan, on its face, is a perfectly acceptable rule. The trial judge should have the first opportunity to rule upon objections to evidence, and his ruling should be made at the time the evidence is offered or even in advance of trial. Ordinarily, a party should not be permitted to stand silently by and later to contest the admissibility of crucial evidence only after the fact finding has gone against him. But surely *Slayton v. Parrigan* does not require defense counsel to speak when he is excusably ignorant of the factual basis of objection later asserted. The rule of *Slayton v. Parrigan* requires a trial lawyer to assert his objections in a timely fashion, but considerations of timeliness do not require a recitation of facts which are unknown to lawyer and client and they are not chargeable by law with knowledge of them. *Slayton v. Parrigan* is an expression of a not unreasonable procedural rule designed to promote orderliness. It need not be distorted into an engine of injustice, foreclosing claims which, for good reasons, could not have been asserted earlier.

The Court of Appeals further observed that petitioner may have a claim for habeas relief in the state courts on the ground of ineffective assistance of counsel. (Cert. App. 15a-16a). 581 F.2d at 1114. Such a claim could be premised upon an allegation of failure to investigate the case or failure to file a post-trial motion raising the "no knock" issue once counsel learned of its existence. These opportunities, like the potential for asserting the "no knock" claim in state court on habeas corpus in the context of an allegation of

denial of the "full and fair opportunity" contemplated by the rule of *Slayton v. Parrigan* and *Stone v. Powell* have not been utilized by petitioner.

Finally, petitioner maintains that this Court should provide "guidance" to determine what constitutes a "full and fair opportunity" under *Stone*. He contends that this is needed because of "the growing body of Court of Appeals cases such as this one which have filled the vacuum by depriving the phrase of any meaning. . . ." (Petition at 8). Petitioner does not cite the cases forming this alleged body of caselaw troubling to him, and respondents submit that this Court should get the benefit of more views and decisions before deciding to add modification or clarifications to so recent a decision as *Stone v. Powell*.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jerry P. Slonaker, Assistant Attorney General of Virginia, counsel for the respondents in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 10th day of January, 1979, I mailed three copies of the foregoing brief for the respondent in opposition to the granting of a writ of certiorari to John Kenneth Zwerling, Esquire, 108 North Columbus Street, Post Office Box 383, Alexandria, Virginia 22313, counsel of record for petitioner.

JERRY P. SLONAKER
Assistant Attorney General